UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DENNIS MONTGOMERY,	)	C15-1955-JRL
Plaintiff,	)	SEATTLE, WASHINGTON
v.	)	February 3, 2016
JAMES RISEN, et al.,	)	Motion Hearing
Defendants.	)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES L. ROBART
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Plaintiff appearing pro se:	Dennis Montgomery 675 NW 85th Court #103 Miami, Florida 33126
For the Defendant:	Eric M. Stahl Davis Wright Tremaine 1201 Third Avenue Suite 2200 Seattle, WA 98101
Other Interested Party appearing pro se, re: Subpoena directed to Istvan Andras Burgyan	Istvan Andras Burgyan 4425 Issaquah Pine Lake Road SE Apt. A-31 Sammamish, WA 98075-6255

THE CLERK: Case C15-1955, Dennis Montgomery versus James Risen. Counsel, please make your appearances for the record.

MR. STAHL: Good morning, Your Honor, Eric Stahl from Davis Wright Tremaine, here on behalf of defendants James Risen and Houghton Mifflin Harcourt.

MR. BURGYAN: Good morning, Your Honor, Istvan Burgyan just representing myself.

THE COURT: Mr. Burgyan.

MR. MONTGOMERY: I'm here on the phone, Your Honor, I'm Dennis Montgomery.

THE COURT: All right. Thank you, Mr. Montgomery. Counsel, the matter that is before me is a motion to compel compliance with a subpoena directed at Mr. -- is it Burgyan, sir, I want to make sure I pronounce it correctly?

MR. BURGYAN: It's Burgyan, but that's okay.

THE COURT: All right. That's a motion brought by defendants. So, Mr. Stahl, I'll hear from you first.

MR. STAHL: Thank you, Your Honor. The defendants' position on this matter is pretty straightforward. They are defending a defamation claim, seeking literally hundreds of millions of dollars. The plaintiff, Mr. Montgomery, has named Mr. Burgyan as a trial witness, named him in August. For that reason, alone, we think we are entitled to conduct discovery from him. And he is also relevant on a few broad issues in the case, which I'll talk about in a minute.

I want to address a couple procedural matters first, just some housekeeping. I hope the court received the supplemental authority we submitted last week. I just want to make sure the court is aware the matter was transferred last week from Florida to the District of D.C.

THE COURT: I'm aware of that.

MR. STAHL: Okay. Nothing much has happened yet in D.C. We have a case number. I've been told the parties are seeking a case schedule, in which we will be seeking sufficient time for a couple of things. This discovery, for one, giving the District of D.C. time to rule on our dispositive motions as well.

I also want to make the court aware that last night, shortly after 6:00 p.m. Eastern time, Mr. Montgomery filed a motion in the District of Columbia, or his counsel Mr. Klayman did, seeking a protective order barring this deposition, essentially attaching, really just attaching the papers that Mr. Montgomery filed pro se in this action.

We don't think that affects this proceeding at all under FRCP 45(d)(3). It's clear that a motion to quash or enforce a subpoena is properly brought in the district where the subpoena is enforceable, in this case, the Western District of Washington. But I wanted to make the court aware of it. And if Your Honor is interested, I have a copy of that motion if the court feels --

MR. MONTGOMERY: Mr. Burgyan got a copy.

THE COURT: All right.

MR. STAHL: On to the substance of the motion. The defendants seek to compel Mr. Burgyan to comply with their subpoena. He lives here in Washington in Sammamish. He is the son-in-law of the plaintiff and he worked with the plaintiff, Mr. Montgomery, at a company Blxware, that contracted with the U.S. Government, and dealt in the software that is at the heart of this underlying lawsuit.

Again, this is a defamation action. The author/journalist Mr. Risen wrote a book about the war on terror, and among other things --

THE COURT: I've read your pleadings, counsel.

MR. STAHL: Okay. I'll cut to the chase, then. The book, as you know, focuses on software that, in the wake of 9/11, was sold to the CIA as being able to detect various terror elements, including supposedly decoded messages from Al Jazeera broadcasts regarding targeted flights. The government ultimately concluded that the software didn't work and was a hoax.

In the Florida action --

MR. MONTGOMERY: That is absolutely not true.

THE COURT: Mr. Montgomery, you'll get your opportunity to speak. Do not interrupt.

MR. MONTGOMERY: I'm sorry, Your Honor. I'm sorry.

MR. STAHL: In the Florida action the magistrate correctly recognized that whether or not Mr. Montgomery's software worked as advertised or was a hoax, is the heart of the matter. It's a defamation case. It's his burden to prove falsity. And, therefore, whether the software works or not is a critical fact.

He directed Mr. Montgomery in the underlying action to produce the software. For a variety of reasons, Mr. Montgomery has either been unable to or refused to do so. But that software is very much in issue.

So where does Mr. Burgyan come in? First of all, he's again a trial witness, and he's not in kind of the peanut-gallery section of the trial list of 50 witnesses. Mr. Burgyan is the third trial witness. There are two witnesses whose names are redacted, and then Mr. Burgyan appears even ahead of Mr. Risen. So my clients have a real concern if he's going to be a trial witness, that that ought to be dispositive of our right to take his deposition and obtain discovery from him.

Beyond that, we want to talk to Mr. Burgyan, because if he weren't a trial witness he has relevant evidence on three broad points in this case. First is the software itself. He worked for three years, according to his LinkedIn page, as a special projects manager for a company called Blxware, which is one of the two companies that had access to this software. So we believe he has information about the operation or performance of the software. Again, as to whether it works or not, which is highly relevant in the underlying case, we've asked him to produce the software, if he has it, documents about the software, communications about the software and its whereabouts, as well as communications with other Blxware employees. And, again, that's important because the software itself, the plaintiff has not been able to produce in the case.

The second broad issue where Mr. Burgyan's testimony is relevant is to the issue of damages. Mr. Montgomery has claimed in his deposition and pleadings, that Mr. Risen's book cost him certain business opportunities in Florida. And he testified in his deposition that Mr. Burgyan is helping to facilitate and explore these opportunities in Florida. It goes to damages.

Similarly, Mr. Montgomery has stated the book aggravated his health condition. Mr. Burgyan, in his objections that he faxed to the later version of the subpoena that we served on him, admits he is Mr. Montgomery's primary caregiver. So he has relevant information about his health, which again goes to damages.

The third issue where Mr. Burgyan's testimony is broadly relevant is where Mr. Montgomery resides. That issue is somewhat less important now that the court in Florida has issued our motion to transfer venue. But it hasn't gone away. Mr. Montgomery's residence is still relevant, first of all, to his issue of credibility. He submitted numerous sworn declarations in Florida, in the Florida action, about his alleged contacts, that we believe were less than candid.

It goes to choice of law. If Mr. Montgomery is a Florida resident, he's alleged that Florida defamation elements are different than the elements of defamation in D.C., and there are some differences in Florida's shield law as well. And also it goes to this issue of lost business opportunities in Florida. If Mr. Montgomery had no real contacts with Florida, his damages theory is less credible.

So for all those reasons we ask that the court grant the motion. None of the objections or reasons that the witness or plaintiff have put forward have any merit. Mr. Burgyan is here, and we'll hear from him, but he did not submit any papers in response to our motion.

To the extent Mr. Montgomery has standing to challenge this subpoena, he's claimed that the subpoena was harassing. The magistrate in Florida found it wasn't the case. He rightfully acknowledged we had some issues with attempts to serve and evasion of service. He's also contended the discovery deadline has passed. That issue is now moot, because the case schedule in Florida is now a non-issue, it's been taken off the calendar because the case was transferred to the District of Columbia.

So we would respectfully ask the court enforce the subpoena. Unless the court has questions, that's all that I have.

THE COURT: Thank you. Mr. Burgyan, I'll hear from you next.

MR. BURGYAN: Thank you, Your Honor.

THE COURT: You might want to raise that microphone.

MR. BURGYAN: Is that better?

From what I understand is that the discovery is passed, and it ended on, I believe, the 19th of November. We -- my father-in-law had submitted a request to extend the discovery, and his side denied it. So if it was so important to him, why would they deny the extension of discovery?

THE COURT: When did they note your deposition, sir?

MR. BURGYAN: Excuse me?

THE COURT: What day was that filed with the court saying: We're going to take your deposition?

MR. BURGYAN: I was served on the 5th of November.

THE COURT: That's what I need to know. Please continue.

MR. BURGYAN: That's basically it, I believe. It's just harassment on their part, that they want to continue to do this when the time has already passed and they did not want to extend the time.

THE COURT: Well, taking your deposition is not harassment if you're listed as a witness. So explain to me why this is harassment?

MR. BURGYAN: I believe it is to get to my father-in-law, to give him more stress about it. Because if it's already past the time, why would they be pursuing it?

THE COURT: Well, it hadn't passed the time at the time they noted your deposition.

MR. BURGYAN: Okay. I thought it had.

THE COURT: Well, did I misunderstand what you told me that the deadline was the 19th, and they noted it on the 5th?

MR. BURGYAN: Yes. That's when they gave me a date. But I believe I was served incorrectly on that day.

THE COURT: Well, I'm not going to get into the questions of service, because frankly I wasn't there. But it doesn't sound great in terms of what happened. All right. Anything else you'd like to say, sir?

MR. BURGYAN: No, Your Honor.

THE COURT: I have one question for you. You're not registered in terms of receiving electronic service. Do you have an e-mail address?

MR. BURGYAN: I do.

THE COURT: All right. Will you consent to using it in this case?

MR. BURGYAN: Yes.

THE COURT: Will you provide it to Mr. Stahl, then?

MR. BURGYAN: Yes, I will.

THE COURT: And also give him your current address. And know that that will become a matter of public record. If there's a problem with that, you need to be aware of it. But that's how we get in touch with you is either by sending you an e-mail, which will be contemporaneous with it being filed in the federal docket and/or by mail. That's why those two things are important.

MR. BURGYAN: Okay. When would you like me to give him that information, when we're finished?

THE COURT: Yes, just write it out and hand it to him when we're done.

Mr. Montgomery, would you like to be heard?

MR. MONTGOMERY: Yes. To start with, in opposing counsel's opening arguments about me selling software to the CIA and all that, totally a lie. I've never sold the CIA the Al Jazeera decoding software to the CIA. But I know this is not the hearing that this is all about. The lawsuit was filed in February of 2015. I've had a stroke, Your Honor, so I'm doing my best. They waited until August to decide -- or whenever, weeks before the cutoff, to serve him. And Mr. Burgyan provided documents that he was improperly serviced, and so forth. They didn't object to that until the middle of December.

So I would think that the discovery rules have long passed. I mean, it's February. We had a trial set for March 21st. Now, their big issue about Mr. Burgyan was jurisdiction and venue. Well, like you said, that's a moot point since it's now been transferred to D.C.

Mr. Burgyan is not a programmer. All the people that were involved in the technology that I was involved with that he's referring to, Mr. Burgyan wasn't one of them. I mean, there were people that were in charge of the company that were billionaires. They didn't subpoena them, I didn't see, or maybe they did and I just don't know.

I just think it's awful late in the game, Your Honor, to be trying to serve Mr. Burgyan when we tried to extend the date and they opposed, it which we never were able to extend the date. I thought as a matter of issue, not only did he have to be served, but when he said that he wouldn't -- wasn't going to appear for improper service, they had to get their objections in by that deadline.

Now, obviously I'm not an attorney, so I don't know. I'm not going to take the court's time up dispelling all of the accusations that the opposing counsel made, because they're outrageous.

So, I would hope that Your Honor would at least let the judge who is now taking over the case in Washington, D.C. deal with this matter. Or if Your Honor decides to rule against Mr. Burgyan, we're given an opportunity to appeal. That's all I have to say, Your Honor.

THE COURT: Well, Mr. Montgomery, you're right apparently you're not a lawyer, so let me give you a very brief basis for what I'm going to do.

The United States has a state court system for whatever state you're in, and it has a federal system. You're in the federal system. There are a number of judicial districts, I think 93 or 94 of them. And the rules provide that if you want something to happen in Western Washington, you need to come to Western Washington. A court in Florida can't compel someone who is not within the jurisdiction of that court to do much of anything. So, it is appropriately here before me.

I'm not hearing the merits of your case, so thank you for understanding that and not trying to argue them, because it really is irrelevant to the issue that's before me.

MR. MONTGOMERY: I understand.

THE COURT: The issue that's before me is the one of the discovery that was ordered out of this district under the motion to compel, or actually apparently the subpoena. And that is properly before me. It doesn't really matter if we're in Florida or if we're in Washington, D.C., the subpoena that came out, came from this court.

In terms of your questions about the discovery deadline and why did they delay. That's something you can take up with your judge in Washington, but it really is not something that I'm going to weigh in on.

So, I am going to grant the motion to compel. Mr. Stahl, when do you want to take -- I assume you asked for documents and you asked for a deposition?

MR. STAHL: That's correct.

THE COURT: All right. When are you going to do it?

MR. STAHL: We would work with the witness, within 30 days to schedule it.

THE COURT: Mr. Burgyan, any problem with that?

MR. BURGYAN: No.

THE COURT: All right. Then --

MR. MONTGOMERY: Your Honor --

THE COURT: Yes.

MR. MONTGOMERY: -- would you at least allow us to appeal to the Ninth Circuit, the decision, before compelling him to appear?

THE COURT: No. You should talk to your lawyer, sir. There are rules about how to take appeals. This is not a question which is normally appealable. There is a procedure whereby you can seek extraordinary relief. But I am not aware of how this ruling would trigger that, particularly on the bases that you've opposed the motion.

So, I'm going to grant the motion to compel, that's both production of documents and the deposition. I'm not going to require re-service of the subpoena, since apparently Mr. Burgyan has a copy of it. And I'm going to direct that it occur within 30 days.

And to the extent that there has been an oral motion to allow an interlocutory appeal to the Ninth Circuit on that ruling, I'm going to deny it.

Mr. Montgomery, the fact that I've denied it doesn't mean that you can't go up to the circuit and ask them to do it. But I'll simply tell you, it's a very unusual motion to see be successful.

Mr. Stahl, anything further on behalf of the defendants?

MR. STAHL: No. Thank you, Your Honor.

THE COURT: Mr. Burgyan, any questions I can answer?

MR. BURGYAN: No. Thank you.

THE COURT: And you'll provide that information and work out a date?

MR. BURGYAN: Yes.

THE COURT: Then we'll be in recess.

Thank you.

(The proceedings recessed.)

C E R T I F I C A T E

I, Debbie K. Zurn, RMR, CRR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

/s/ *Debbie Zurn*

DEBBIE ZURN
OFFICIAL COURT REPORTER